ESTATE OF NEAL KAY MANUEL

IBIA 85-6-Q Decided December 27, 1984

Certification of interlocutory questions by Chief Administrative Law Judge (Indian Probate) Melvin J. Mirkin.

Interlocutory review denied.

1. Indian Probate: Interlocutory Appeals

> In order to conserve judicial resources, to expedite final resolution of cases, and to prevent the cost and delay of successive appeals, interlocutory appeals should be reserved for those extraordinary circumstances where prompt appellate consideration is essential, as, for example, in those situations in which the decision by the Administrative Law Judge threatens a party with immediate and serious irreparable harm which, as a practical matter, cannot be redressed on appeal. In those cases in which any error in the interlocutory decision, as well as any other error that might be alleged, can be considered and corrected on appeal, an interlocutory appeal is generally not appropriate.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On December 10, 1984, the Board of Indian Appeals (Board) received an interlocutory certification of two questions of law from Chief Administrative Law Judge (Indian Probate) Melvin J. Mirkin. The questions concern the construction and effective date of certain amendments to section 207 of the Indian Land Consolidation Act of 1983. Act of January 12, 1983, P.L. 97-459, 96 Stat. 2515, 2519, amended by Act of October 30, 1984, P.L. 98-608, 98 Stat. 3171, ___.

In Estate of James Largo, 12 IBIA 224, 91 I.D. 185 (1984), the Board held that 43 CFR 4.28 was sufficient authority to permit the Indian Probate Administrative Law Judges to certify controlling questions of law to the Board on an interlocutory basis under appropriate circumstances. Section 4.28 states in its entirety:

> There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from

> an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

Because the present matter is the first interlocutory certification since the decision in Largo, the Board has not elaborated further upon what constitutes appropriate circumstances for the exercise of its discretionary authority to consider interlocutory appeals. The question has, however, been considered quite extensively by other judicial and quasi-judicial bodies. There is a general policy within the judicial and administrative systems of this country against piecemeal appellate review. This policy was expressed as early as 1891 by the Supreme Court in McLish v. Roff, 141 U.S. 661, 665-66 (1891):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

See also Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955).

For Federal courts, this policy is embodied in 28 U.S.C. § 1291 (1982), which provides that the courts of appeal have jurisdiction over appeals from all final decisions of the district courts. The principal exception to this rule of finality is set forth in 28 U.S.C. § 1292 (1982). Section 1292(a) provides for interlocutory appeals in certain specified situations. Section 1292(b), the provision analogous to the regulation in 43 CFR 4.28, allows the certification of an interlocutory appeal to the appellate court when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and * * * an immediate appeal from the order may materially advance the ultimate termination of the litigation." This statute makes the acceptance of an interlocutory appeal discretionary with the appellate court.

[1] In order to conserve judicial resources, to expedite final resolution of cases, and to prevent the cost and delay of successive appeals, interlocutory appeals in both judicial and administrative forums are generally reserved for those extraordinary circumstances where prompt appellate consideration is essential, as, for example, in those situations in which the ruling or decision by the trial court or Administrative Law Judge threatens a party with immediate and serious irreparable harm which, as a practical matter, cannot be redressed on appeal. In those cases in which any error in the interlocutory ruling or decision, as well as any other error that might be alleged, can be considered and corrected on appeal, an interlocutory appeal is generally not appropriate:

> Upon this application for leave to appeal it would not be appropriate to isolate and endeavor to decide before an appeal from any final judgment this particular question of law. Pretrial leave to appeal applications must be decided against the background of the entire case. Many important questions of law will undoubtedly arise in these cases but the problem now confronting us is the feasibility and advisability of trying to decide this particular question in advance of trial * * *.
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> * * * If the district court is in error [on the interlocutory ruling,] * * * defendants will have full opportunity in the event of an adverse judgment, if based in whole or in part upon this error, to have it corrected upon appeal together with any other errors that may be urged * * *. Since defendants' rights to this defense are not being taken away or prejudiced on any ultimate appeal by denial of the pre-trial appeal now sought, we believe that the ultimate disposition of these cases would be delayed rather than advanced by granting this application.

Atlantic City Electric Co. v. General Electric Co., 337 F.2d 844, 845 (2d Cir. 1964).

In the present matter, Judge Mirkin has already held a hearing and has considered the case sufficiently to identify some of the questions of law that are raised. Although he has certified two of those questions to the Board for interlocutory consideration, his certification itself gives his preliminary decisions on those questions.

The case before Judge Mirkin appears ready for decision in accordance with the requirements of 43 CFR 4.240. The Board does not believe that interlocutory consideration of the questions certified will materially advance the final decision in this case. On the contrary, as noted by the court in Atlantic City Electric Co., supra, interlocutory review will more than likely delay a final decision. If any error is alleged in Judge Mirkin's ruling on the certified questions, that error, along with any other error that might be raised, can be considered through the usual appellate review procedures. 1/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, interlocutory review

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1/ In contrast to this case, in Largo, supra, it was almost certain that the question of law certified to the Board would not be addressed through the normal appellate review procedures. The issue there involved the Department's responsibility for accurately maintaining land title records to Indian trust allotments. Because the same people would have received title to the trust allotment at issue regardless of the decision on the certified question of law, there would have been no one to bring an appeal. However, if decided incorrectly, a manifest error would have existed in the Department's land title records. Interlocutory review was appropriate in this circumstance.

of the questions certified to the Board in this matter is denied. The case shall remain with Judge Mirkin for decision.

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Bernard V. Parrette
Chief Administrative Judge

We concur:

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Jerry Muskrat
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge